MOTION FILED
AUG 21 1998

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No. 97-2063

IN THE
Supreme Court of the United States
October Term, 1997

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI,
TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of petitioner, pursuant to Rule 37.3 of the rules of this Court. Consent to the filing of this brief *amicus curiae* has been received from counsel for Petitioner and counsel for Respondents Tammy Snider and Michael Avery. However, Respondent The Honorable John Speroni has indicated that he takes no

position as to whether to grant consent to the filing of this brief *amicus curiae*, which has necessitated this motion.

The Chamber is the world's largest business federation. With substantial membership in each of the fifty States, the Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business and in every region of the country. The Chamber thus serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases addressing issues of national concern to the American business community. The Chamber has sought to advance those interests by filing *amicus curiae* briefs in numerous cases addressing issues of class certification, including *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Additionally, the Chamber has also testified in Congress on the issue of state court class action abuses. Stateside Associates, *Class Actions in State Courts: A Report on Alabama* (Feb. 26, 1998) (attached to *Class Action Jurisdiction Act of 1998: Hearings on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar 5, 1998) (statement of Dr. John B. Hendricks on behalf of the United States Chamber of Commerce) available in 1998 WL 122544).

The Chamber's membership is composed of businesses that are particularly vulnerable to class action litigation. Chamber members have been targets in some of the nation's most publicized class action lawsuits, which have asserted claims in a wide variety of contexts, including consumer protection, securities, product liability, tort and antitrust. The Chamber and its members believe that state as well as federal courts should rigorously adhere to rules and procedures governing class actions, and maintain those due process

protections to defendants articulated by this Court in the class action context.

The Chamber believes that the overly expansive class certified by the Illinois circuit court and the court's order foregoing the requirement of providing actual notice to identifiable class members are fundamentally at odds with decisions of this Court imposing due process limitations on the certification of class actions and the requirements of proper notice to class members. If other state courts attempt to exert their power upon sister states with respect to transactions wholly occuring in those states, as the Illinois circuit court has done in this case, Chamber members would be placed in the untenable position of choosing between two competing bodies of law.

The Chamber seeks to appear as *amicus curiae* to stress how the Illinois circuit court's certification and notice orders are part of a disturbing trend of unfounded class action litigation, which is adversely affecting the competitive vitality of American business. Lawsuits alleging consumer fraud, as in this case, are all too often "lawyer driven" actions brought in order to generate enormous legal fees, rather than provide any real substantive benefit to putative class members. Indeed, class actions of dubious merit lead to an unwarranted redistribution of societal resources from American businesses, their shareholders and employees, to class action lawyers.

The Chamber can assist the Court by providing a broader perspective to the issues in this case, as well as a fuller discussion of the significance of a nationwide class certification decision that disregards the due process rights of corporate defendants. Accordingly, the Chamber respectfully requests that it be allowed to participate in this case and to file the

accompanying brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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Dated: August 21, 1998

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* The Chamber of Commerce of the United States of America ("the Chamber") is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This case squarely presents a troubling example of an increasingly recurring trend that is of great significance to the Chamber's member businesses -- the misuse of the class action device in certain state courts as a means of trampling corporate defendants' due process rights and coercing unfair settlements from defendants who lack any realistic opportunity to defend themselves properly once certification is granted.[1] The certification and notice orders of the Illinois circuit court embody many of the most systemic and recurring abuses in current state court class action practice, and are irreconcilable with decisions of this Court setting due process limitations regarding the scope of class certifications and notice to class members. The circuit court's decisions infringe on the due process rights of State Farm as well as absent class members, impede interstate commerce and violate principles of federalism designed to preserve the sovereignty of Illinois' sister states.

As is all too common in Illinois and a number of other states, the original class was conditionally certified *ex parte*, within hours of the filing of the complaint, before the defendant had been served or even heard about the action. The small county court in which this case was filed, without any real nexus to the underlying dispute, subsequently held a pro forma

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[1] Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

certification hearing and finalized the certification of this 48-state class action. Indeed, this class was certified despite the fact that the insurance statutes and regulations of numerous states either expressly permit or even require the use of parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts"). The circuit court then compounded its constitutional errors by failing to require class notice by mail to the significant percentage of putative class members whose names and addresses were readily available, in clear violation of the procedural due process rights of State Farm as well as the absent class members. *See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-97 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

This Court should review the certification and notice orders of the Illinois circuit court despite their interlocutory nature. As courts have noted, in large nationwide class actions the pressure on defendants to settle once a case is certified is enormous and often insurmountable, which effectively precludes any post-judgment judicial review of an erroneous certification decision. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

This case presents the Court with an excellent opportunity to redress the underlying constitutional flaws in the certification and notice orders of the Illinois circuit court that are typical of nationwide class actions being erroneously certified by a number of state courts. In particular, the certification order of the Illinois circuit court cannot be reconciled with the constitutional jurisprudence of this Court, which prevents state courts from applying the forum's law to transactions that wholly occurred in other States, and as to which the forum state lacks any significant interest. *See, e.g., BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 571-73 (1996); *Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 818-23 (1985). The circuit court's finding that it could apply the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 (West 1998) (the "ICFA"), to the claims of all class members living throughout almost the entire country violates this due process constraint.

At the same time, an immediate review of the trial court's ruling authorizing notice to class members by publication only, despite the fact that a significant percentage of the putative class could be actually identified, is necessary in order to prevent absent class members from later arguing that they are not bound by any judgment reached in this case because of inadequate notice. *See Shutts*, 472 U.S. at 805. Accordingly, this case presents an excellent opportunity for the Court to provide much needed guidance as to the due process mandates governing the certification and notice requirements for class actions in state courts, particularly in nationwide class actions, and to rein in the abuses of the class action device increasingly occurring in state courts around the country.

ARGUMENT

I. THE CIRCUIT COURT'S CERTIFICATION AND NOTICE ORDERS RAISE RECURRING DUE PROCESS ISSUES AT THE CORE OF THE PROBLEM OF STATE COURT CLASS ACTION ABUSE THAT NECESSITATE IMMEDIATE GUIDANCE FROM THIS COURT

A. The Abuse of the Class Action Device in State Courts is a Growing Problem That Requires the Intervention of this Court to Preserve the Due Process Rights of Defendants and Absent Class Members

In recent years, corporate defendants have been besieged by an ever increasing number of putative class actions

filed in state, as well as federal, courts. As noted by the Honorable Paul V. Niemeyer, Chairman of the Advisory Committee on Civil Rules of the Judicial Conference, "the adjudication of mass torts and the use of class actions is transforming the litigation landscape. Class actions are being certified at unprecedented rates, and they are involving a substantial, if not a majority, of all American citizens." *Hearings on Class Action Lawsuits Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary,* 105th Cong. (Oct.30, 1997) statement of Paul V. Neimeyer, United States Circuit Judge, Court of Appeals for the Fourth Circuit, available at 1997 WL 680300.[2]

As federal courts have recently demonstrated an increasing and well-founded skepticism toward the certification of nationwide class actions asserting state law claims,[3] the

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[2] In discussing the testimony presented before the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 at three public hearings, Judge Niemeyer noted in a memorandum to the members of the Advisory Committee that "one witness stated that his company's exposure to class actions has increased 300% in the last three years; another stated 400-500% in the last two years; another, 500-1000% in the last three years; and yet another 300-400% in the last three years. One financial institution's counsel stated that his company was involved in 65 class actions in 1996 alone." 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* at x (May 1, 1997) (hereinafter "*Advisory Committee Working Papers*").

[3] *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997); *Andrews v. American Tel. & Tel.*

(continued...)

"battleground" has largely shifted to state courts. Indeed, much anecdotal evidence confirms that the number of state court class actions has skyrocketed in recent years. For example, a recent study sponsored by the RAND Institute for Civil Justice reports a "doubling or tripling of the number of putative class actions" over the past several years, with the growth "concentrated in the state courts, as plaintiffs and defendants both see increased unwillingness among federal judges to certify or to sustain certification of class actions." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (1997); *see* also Minutes, Advisory Committee on Civil Rules, Nov. 9 and 10, 1995, at 15 ("There has been an explosion in state class actions. Many of them involve claims that are framed as 'fraud' claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable."), *reprinted in* 1 *Advisory Committee Working Papers* 244; Draft Minutes, Civil Rules Advisory Committee, Oct. 17 and 18, 1996, at 6 ("Plaintiffs are moving more and more to state courts, particularly in the wake of the Supreme Court decision [in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996)] that seems to entrench the full-faith-and-credit effects of state class-action judgments."), *reprinted in* 1 *Advisory Committee Working Papers* at 295.

The onslaught of class actions in state courts is directly attributable to the fact that certain state court judges will simply acquiesce to requests by plaintiffs' lawyers for nationwide class certification, despite the fact that these expansive national

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[3] (...continued)
Co., 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U. S. 867 (1995).

classes all too often eviscerate the due process rights of defendants and absent class members, ignore state class action procedural rules and impede the sovereign rights of sister states to adjudicate their own disputes.

A recent study of state court class action filings in six small rural Alabama counties conducted by Stateside Associates, which researches state government issues, produced some startling findings as to the breadth of class action abuses in one representative State (the "Stateside Associates Report"). The Stateside Associates Report concludes that in the 1995-1997 period, the number of filed class actions increased dramatically (91 in the six surveyed counties) and now comprises a disproportionately large percentage of the dockets of some of the county courts surveyed (nearly 10% in one example). Stateside Associates, *Class Actions in State Courts: A Report on Alabama* (Feb. 26, 1998) (attached to *Class Action Jurisdiction Act of 1998: Hearings on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar 5, 1998) (statement of Dr. John B. Hendricks on behalf of the United States Chamber of Commerce) available in 1998 WL 122544 (the "Hendricks Statement")). The Stateside Associates Report further notes that these class actions are typically targeted against major multinational corporations based outside of Alabama on behalf of a putative multi-state or nationwide class, and that the classes are almost always certified.[4]

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[4] Confirming the view that some state court judges have never seen a class action they did not like, the Stateside Associates Report notes that one Alabama circuit judge has not denied a request for certification in the last three years, and granted motions to certify in 30 cases in 1996 and 1997 alone. In contrast, in 1997 all 900 federal district court judges in the

(continued...)

The state courts in which certification abuse is most rampant are those jurisdictions that have been carefully chosen by plaintiffs' attorneys because of their willingness, and even eagerness, to certify classes that federal courts are increasingly unwilling to certify. Because there is no mechanism in state courts to consolidate competing state court class actions comparable to the federal multi-district litigation transfer process, defendants are often forced to defend multiple putative state court nationwide class action lawsuits alleging the same factual allegations, and making the same claims on behalf of the same putative class members. These competing and often directly overlapping state court class actions are always subject to a risk of inconsistent results. As a result, the same putative class members and their lawyers often have several bites at the apple in various states to attempt to have a class action certified.

As this case amply demonstrates, forum shopping by the plaintiffs' attorneys – a factor that should have no bearing on how the constitutional requirements of class action litigation are being applied – can be the single most important factor in determining whether a class will be certified, as well as the scope of that certification. Indeed, the certification decision by the Illinois circuit court presents a compelling and particularly egregious example of a 48-state class action based solely on state law claims, where several federal and state courts have refused to certify even a single statewide class raising the same allegations certified in this case, because of, among other things, the lack of predominance of common issues. *See*

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[4] (...continued)
United States certified a total of only 38 class actions, as identified through computerized legal research data bases, excluding cases against the government and discrimination class actions. *See* Hendricks Statement at 4-5.

Murray v. State Farm Mut. Auto. Ins. Co., No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.*, No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998); *see also* *Moorhead v. State Farm Mut. Auto. Ins. Co.*, No. 95-AR-0668-S, Order at 6 (N.D. Ala. Sept. 12, 1997) (refusing to certify class because of inadequacy of class representatives, but expressing doubt as to whether the class claims satisfied the commonality requirement) *cited in* Petition at 18.

Moreover, the circuit court's holding in this case that the ICFA could be applied to the entire 48-state class, *see Pet. App.* at 11a, is directly contradicted by Illinois federal courts applying the ICFA. In *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill. 1997), the court denied a motion to certify a class of Illinois residents as well as non-residents raising a claim under the ICFA for allegedly excessive fees for pharmaceutical prescriptions. The court held that the ICFA could not be applied to the plaintiff class as a whole, because there was "virtually no connection to Illinois for those plaintiffs who are not Illinois residents. . . . On these facts, *where the only connection with Illinois is the headquarters of one defendant*, we conclude that the ICFA does not apply to the claims of the non-Illinois plaintiffs. . . ." 172 F.R.D. at 339-40 (emphasis added). As a result, because the ICFA applied to only a small subset of the proposed class, the court held that common issues did not predominate, and declined to certify a nationwide class with respect to this claim. *See id. at 340.*[5] Indeed, federal

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[5] In contrast, the circuit court's reliance on *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840 (Ill. 1987) in authorizing the application of the ICFA in this case simply because the defendant was headquartered in Illinois is completely misplaced. In *Martin*, unlike the present case, the contracts containing the allegedly deceptive statements were all

(continued...)

courts in Illinois have refused to certify nationwide class actions where the consumer fraud statutes of other states may be applicable, on the grounds that there are variations in those laws, including "differing standards of proof, procedure, substance, and remedies" that may be applicable. *Tylka v. Gerber Prods. Co.*, No. 96 C 1647, 1998 WL 93277, at *4 (N.D. Ill. Mar. 3, 1998); *see also Fisher v. Bristol-Myers Squibb Co.*, No. 97 C 5983, 1998 WL 299798 (N.D. Ill. May 28, 1998) (refusing to certify a nationwide class limited to consumer fraud liability questions); *Laughman v. Wells Fargo Leasing Corp.*, No. 96 C 925, 1997 WL 567800 (N.D. Ill. Sept. 2, 1997) (nationwide class certification denied where, *inter alia*, the impact of variations in state consumer fraud laws on the significance of uncommon fact questions was not demonstrated).

The Illinois circuit court's broad certification order in this case contrasts sharply with those decisions refusing to certify comparable classes governing the same alleged conduct or causes of action, and demonstrates the growing split between state and federal courts regarding the appropriate due process limitations on the certification of nationwide class actions. Only this Court can clarify the scope of the constitutional constraints on the certification of multi-state class actions,

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[5] (...continued)
executed in Illinois, and all contained express choice of law and forum selection clauses specifying that any litigation would be conducted in Illinois, pursuant to Illinois law 510 N.E.2d at 847. In addition, the contracts provided that all payments were to be remitted and all complaints referred to the defendant's Illinois headquarters. *Id.* Nothing in *Martin* suggests that Illinois law could properly be applied to an out-of-state transaction that lacked any of these features, simply on the grounds that the defendant maintains its corporate headquarters in Illinois.

which would provide greater consistency between certification decisions in state and federal courts, and would inhibit the blatant forum shopping that the present system fosters, and which the present case so forcefully demonstrates.

B. The Pressure to Settle Certified Nationwide Class Actions Necessitates the Interlocutory Review of the Certification Order by this Court to Preserve the Defendant's Due Process Rights

The Court should act now to review the class certification order in this case despite its interlocutory nature, because in such a massive putative class action, a certification order creates enormous pressure on a defendant to settle, irrespective of the merits of the claims or the strength of the defenses. Class actions are unique in our judicial system in that as a practical matter, a certification decision effectively determines the outcome of the case, and coerces a defendant into giving up its right to a trial on the merits. Once a case is certified, particularly a nationwide class action involving millions of class members, the experience of the Chamber's members is that they are generally unwilling to go to trial in light of the extraordinary financial risk to their companies if an adverse verdict were entered on the certified common issues. As a result, the propriety of the certification decision is almost never reviewable after a final judgment is entered. Only an interlocutory challenge to a certification order is possible, which in state court generally requires a writ of mandamus or prohibition, a formidable standard that, as in this case, appellate courts only rarely find satisfied.[6]

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[6] In this case, when State Farm initially petitioned for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, contending, *inter alia*, that the certifica-

(continued...)

As explained by the Fifth Circuit panel in *Castano v. American Tobacco Co.*, "[c]lass certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards." 84 F.3d at 746 (citation omitted). Moreover, certification "creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." *Id.; see also Rhone-Poulenc*, 51 F.3d at 1298 (noting that defendants facing potential class liability in the billions of dollars "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").[7] As noted by William T. Coleman,

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[6] (...continued)
tion order violated State Farm's due process rights and infringed the sovereignty of Illinois' sister States, the Illinois Supreme Court issued an order stating that there were insufficient votes either to grant or to deny the petition. *See* Petition at 7. After the circuit court amended the definition of the class and adopted class counsel's notice plan, State Farm again moved for a writ of mandamus and/or prohibition or, in the alternative, for a supervisory order, which was denied without comment on March 24, 1998. *See Pet. App.* at 1a.

[7] A 1996 study of class actions in four federal district courts published by the Federal Judicial Center at the request of the Advisory Committee on Civil Rules supports the conclusion that certification compels defendants to settle. The Report states that "certified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified." Thomas E. Willging et al., (continued...)

Jr., a member of the Advisory Committee on Civil Rules at the time Rule 23 was amended in 1966, in discussing the pressures imposed by claims with little likelihood of success but involving multi-million member classes:

> No right-minded general counsel can turn a blind eye to that kind of financial risk. Thus, even where the claims involved are utterly without merit, Rule 23 hands counsel a fully loaded gun with which to press corporate defendants and individuals with deep pockets unfairly. In case after case, defendants are being forced into settlements driven not by what suits the best interests of the putative class members, but rather by what enhances the financial interests of class counsel.

Statement of William T. Coleman, Jr., on the Proposed Amendments to Fed. R. Civ. P. 23 Before the Advisory Committee on Civil Rules, *reprinted in* 4 *Advisory Committee Working Papers* at 452.

Although Federal circuit courts are generally reluctant to grant a writ of mandamus to review the decision of a district court, mandamus has been granted to decertify classes, where the party seeking the writ had no other adequate means to correct the lower court's clear abuse of discretion. *See, e.g., In re American Med. Sys., Inc.*, 75 F.3d 1069, 1078-90 (6th Cir. 1996); *Rhone-Poulenc* 51 F.3d at 1295; *In re Fibreboard Corp.*, 893 F.2d 706, 709-12 (5th Cir. 1990); *In re Bendectin*

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[7] (...continued)
Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996), *reprinted in* 1 *Advisory Committee Working Papers*, App. B, at 62.

Prods. Liab. Litig., 749 F.2d 300, 302-07 (6th Cir. 1984); *see also* Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (granting writ to decertify putative class of customers who were allegedly discriminated against as well as order allowing nationwide advertising and mass mailings prior to certification).

The proposed amendment to Fed. R. Civ. P. 23 to add subdivision (f) would give federal courts of appeals discretionary power to hear appeals from an order granting or denying class certification, without the necessity of applying the requirements of 28 U.S.C. § 1292(b) or the strict standards for mandamus review. The Committee Note accompanying this proposed amendment recognizes that an interlocutory review of certification decisions is desirable because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in 1 Advisory Committee Working Papers* 157.

However, this proposed amendment to Rule 23 would not apply to class action practice in state courts in Illinois or other states, and parties seeking to challenge the propriety of a certification order are generally left to the rarely granted remedy of a writ of mandamus or prohibition. Because a trial of the purportedly common issues identified by the circuit court in this case is unlikely ever to occur, given the inexorable pressure faced by defendants to settle nationwide class actions with millions of putative class members, granting certiorari where there is an interlocutory decision is the only means by which this Court may effectively review the fundamental and recurring due process violations evidenced in this case.

II. THE CERTIFICATION ORDER CONFLICTS WITH DECISIONS OF THIS COURT IMPOSING CONSTITUTIONAL LIMITATIONS ON THE APPLICATION OF A FORUM STATE'S LAW TO TRANSACTIONS WHOLLY OCCURRING OUTSIDE THE STATE

In a variety of contexts, this Court has definitively rejected efforts on the part of state courts to apply local laws to transactions occurring entirely in other states. For example, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that the State of Alabama could not punish defendant BMW under Alabama's law of fraud for vehicle repairs that had no connection to that State. This Court noted that states could not dictate the policy choices of other states, and held that under principles of state sovereignty, Alabama could not punish defendant BMW for conduct that was lawful in other states. 517 U.S. at 571-72. This Court held:

> [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. . . . Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Id. at 572-73 (footnote omitted). This Court further noted that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Id.* at 572 n.17 (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964)). *See also Geressy v. Digital Equip. Corp.*, 950 F.

Supp. 519, 521 (E.D.N.Y. 1997) (applying *Gore* in noting that "judicial development of state law can only be directed at activity within the state").

The Illinois circuit court's certification decision is irreconcilable with *Gore*, because the court's decision to apply Illinois substantive law improperly overrides the policy decisions of the 47 other States subject to the class definition, many of which have statutes or regulations that specifically authorize the use of non-OEM parts. Indeed, Massachusetts requires the use of non-OEM parts except in certain limited circumstances, Mass. Regs. Code tit. 211, § 133.04 (1996), and Hawaii requires insureds to pay the price differential if they insist on receiving OEM parts. Haw. Rev. Stat. Ann. § 431:10C-313.6(a) (Michie 1997).[8] Each state has its own policy preferences with respect to the use of non-OEM parts, and any attempt by the Illinois circuit court to compel a nationwide prohibition on the use of such parts improperly intrudes on the sovereignty of Illinois' sister states and violates the mandate of *Gore*. *Cf. Gore*, 517 U.S. at 569-70 (noting the patchwork of rules governing automobile repair disclosure, "representing the diverse policy judgments of lawmakers in 50 States").

It is unfathomable and unjust for an Illinois court, upon entry of a judgment in this case, including the requested injunctive relief, to require State Farm to make a Hobson's choice between facing contempt proceedings in the Illinois court for continuing to use non-OEM parts in Massachusetts, or liability in Massachusetts for failing to carry out that state's statutory mandate in specifying non-OEM parts. This consti-

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[8] The Court is referred to the Petition at 12-13 n.7 for a complete listing of state laws and regulations governing the use of non-OEM parts.

tutes a wholly unacceptable burden on interstate commerce. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (the Commerce Clause "protects against inconsistent legislation arising from the projection of one state['s] regulatory regime into the jurisdiction of another State"); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois' anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois, even though it was being applied to a tender offer for an Illinois corporation); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959). Under the Commerce Clause, Illinois simply has no right to tell other states how they should conduct business in their states, and cannot constitutionally impose sanctions that would restrict interstate commerce. *See Healy*, 491 U.S. at 336 ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.").

Similarly, the circuit court's application of Illinois law to the claims of class members with no connection to the forum state directly violates this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, this Court noted that the forum state, in that case Kansas, could not "take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" 472 U.S. at 821. The forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Neither the Due Process Clause nor the Full Faith and Credit Clause allow Kansas to "'abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Id.* at 822 (*quoting Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

As in *Shutts*, Illinois has no legitimate interest in determining whether State Farm may specify the use of non-OEM repair parts on vehicles owned by residents of states other than Illinois, in accordance with insurance policy language reviewed and approved by the insurance regulators of that State. Similarly, in violation of the mandate of *Shutts*, there could be no reasonable expectation on the part of either State Farm or its policyholders in states other than Illinois that Illinois' consumer fraud law would govern any disputes between them. 472 U.S. at 822. As a result, the circuit court's application of the ICFA to the claims of every class member, irrespective of the State where they purchased their State Farm policy and/or entered into a repair transaction, merely to facilitate litigation of this case as a class action, is arbitrary and unfair, and a gross violation of due process.

Moreover, the circuit court's decision to apply the ICFA to the claims of all class members fails to take into account the significant variations in the consumer fraud laws of the various states, many of which, unlike in Illinois, do not encompass claims arising out of insurance contracts. *See* Petition at 12 n.7. As recently noted by the Northern District of Illinois in *Fisher v. Bristol-Myers Squibb Co., No. 97 C 5983,* 1998 WL 299798 (N.D. Ill. May 28, 1998), there are "troublesome variations" in the consumer fraud laws of the 50 states that cause "serious reservations about certifying a nationwide class." 1998 WL 299798, at *6. In *Fisher*, contrary to the present case, the court refused to certify a nationwide class limited to consumer fraud liability questions because a class action would not be a superior method of resolving the controversy in that case as to whether a prescription drug caused harm. *Id.* at *9. *See also In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (denying certification of a nationwide class because differences among the States' consumer fraud

statutes as well as differences in other applicable laws rendered the class action unmanageable).

As a result, this Court should grant certiorari to reemphasize that the law of the defendant's domicile may not be constitutionally applied to transactions wholly occurring outside of that state.

III. THE CIRCUIT COURT'S NOTICE ORDER IS IRRECONCILIABLE WITH DECISIONS OF THIS COURT REQUIRING THAT ACTUAL NOTICE BE PROVIDED TO IDENTIFIABLE CLASS MEMBERS

This Court has stated that as a matter of due process, when the names and addresses of putative class members may be readily identifiable, those persons must be afforded actual notice, either through personal or mail service. *See, e.g., Tulsa Prof'l Collection Servs, Inc. v. Pope*, 485 U.S. 478, 484-85 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-97 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). In these circumstances, relying merely on publication notice is constitutionally inadequate in apprising these parties of the existence of the proceeding that will affect their rights. In *Eisen*, the Court held that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." 417 U.S. at 173. Similarly, in *Shutts*, a state court class action, the Court held that the Kansas notice procedure satisfied due process, where a fully descriptive class notice was sent by first class mail to each class member, with the opportunity to "opt out" of the class. 472 U.S. at 812.

As a result of these holdings, the circuit court's ruling that class counsel could rely on publication notice, and not provide actual notice to the 1.8 million policyholders whose names and addresses could be identified from State Farm's

computerized database, violates due process and is irreconcilable with this Court's decisions in *Eisen* and *Shutts*. The facts relied on by the circuit court -- that mailed notice would be no more effective than notice by publication, and that a certain number of the policyholders would certainly have changed their addresses -- simply do not obviate the need for actual notice to at least the substantial percentage of the putative class members that could be identified by such means.[9] *See Eisen*, 417 U.S. at 175 (notice by publication is a poor substitute for actual notice). The circuit court's decision to forego actual notice to any putative class member is completely indefensible under this Court's due process jurisprudence and provides another example of how the circuit court's eagerness to certify this class action violated the rights of State Farm as well as the absent putative class members. To the extent there is any doubt as to the due process requirements for class action notice, they should be resolved by this Court.

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[9] The inadequacy of the publication notice in this case is confirmed by the Notice Plan Implementation Report dated July 10, 1998, filed with the circuit court subsequent to the filing of the Petition. This Report indicates that a mere 15 opt-outs have been received by class counsel out of a publication notice plan that allegedly reached 78 % of the estimated five million putative class members. This represents an opt out rate of "far less than 0.01% of the class." *See* Notice Plan Implementation Report at 4-5, 7-8. The paucity of opt-outs received as a result of the publication notice can only mean that the notice was an inadequate means of reaching the putative class members. *See Shutts*, 472 U.S. at 813 (approving class notice by first class mail and noting that actual notice resulted in opt-outs by greater than 10% of the putative class).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 21, 1998